Supreme Court, U. S.
FILED
OCT 22 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-749

CARLOS AND EMMA BLANCO,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

TOWNER LEEPER
JOSEPH CHAGRA

Attorneys for Petitioner

444 Executive Center Blvd.
Suite 112
El Paso, Texas 79902

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

CITATIONS TO OPINION BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED FOR REVIEW. 2

STATEMENT OF THE CASE. 3

REASONS WHY THE WRIT SHOULD BE GRANTED 5

CONCLUSION AND PRAYER. 14

PROOF OF SERVICE. 15

APPENDIX A - - ORDER OF THE UNITED STATES COURT OF CLAIMS A-1

TABLE OF AUTHORITIES

Cases: Page

Banker's & Farmers Life Ins. Co. v U.S. 42 AFTR 2d 78-1690 (8th Cir 1979) 10

Brantley v Thomas 22 Tex 270 5

Carter v Dean (CA) 317 SW2d 607 5

Cator v Commonwealth Bonding & Cas. Ins. Co. (Com) 216 SW 140 5

Crellin's Estate v Commissioner, 203 F.2d 812 (1953), aff'g 17 T.C. 781 (1951), cert denied 346 U.S. 873 (1953) 6

Currie v Trammel (CA) 289 SW 736 en ref 8

Frost v First State Bank & Trust Co. (Com) 276 Sw 222 9

General Finance & Guaranty Co. v Smith (CA) 309 SW2d 531 ref den, err ref N R E 9

Gauss-Langenberg Hat Co. v Alley (CA) 154 SW 1062 9

Haile v Amarillo Nat. Bank 283 SW2d 276. 8

Hancock v Commissioner, 18 T.C. 210 (1952) 7

Hobart Lerner (United States Tax Court 1979) 71 T.C. No. 24 13

Hoffman Motors v G.F.C. Corp. (CA) 304 SW2d 216, reh den, err ref N R E 5

Lanford v Parsons (CA) 237 SW2d 425, reh den, en ref N R E. 5

TABLE OF AUTHORITIES (Continued)

Cases: Page

Mathews v Commissioner (5th Cir 1975) 520 F.2d 323 13

McKinney v Rowson (F.) 7 Co. (CA) 146 SW 643 5

Meyer's Estate v Comm'r 200 F.2d 592 (5th Cir. 1952) 10

Mitchell v Bookwalter Wheel Co., 4 OHIO N.P.N.S. 609 aff'd 75 U.S. 639 7

Raymond v U.S. 4 AFTR 5293, 269 F.2d 181 (6th Cir. 1952). 10

Restatement, Law of Contracts Sections 424-430. 8

Robert W. Adams (1972) 58 T.C. 41. 6

Slaughter v Hall (CA) 133 SW 496 9

Street v Smith Bros. Grain Co. (CA) 255 SW 778 8

The Oriental v Barclay (CA) 41 SW 117 6

Texas Co. v Ramsower (Com) 7 SW2d 872 reh den. 5

3 Merten's, *Law of Federal Income Taxation* Section 60.19 . .10

Van Zandt v Commissioner (5th Cir 1965) 341 F.2d 440 13

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO.

CARLOS AND EMMA BLANCO,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioners, CARLOS and EMMA BLANCO, respectfully pray a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Claims entered in this proceeding on July 18, 1979.

CITATIONS TO OPINIONS BELOW

The United States Court of Claims, Chief Judge Friedman presiding, entered its Decision on July 18, 1979.

JURISDICTION

Petitioners appeal from the judgment of the United

States Court of Claims decided July 18, 1979. Jurisdiction of this Court is involved under 28 U.S.C. 1255 and 2101, and Supreme Court Rule 19.

QUESTIONS PRESENTED FOR REVIEW

(1) May the parties to a transaction rescind same in the same taxable year, prior to audit by the Internal Revenue Service, so to void its effectiveness for federal income tax purposes?

(2) May parties to a transaction who substitute a valid new agreement in extinghishment of old (Novation), void the original agreement's effectiveness for federal income tax purposes?

(a) The Court of Claims misapplied and misconstrued the reasoning of the Fifth Circuit in the *Meyer's* case.

(3) May parties to a series of transactions executed under a single theme collapse the transactions for federal income tax purposes or can the Commissioner of Internal Revenue alone do so?

(a) If so, is effective tax planning and correspondent reduction of taxes a valid business purpose in non-reorganization areas?

STATEMENT OF THE CASE

The taxpayers are husband and wife residing in Las Cruces, New Mexico. Plaintiffs filed their income tax returns for the periods in question with the Internal Revenue Service Center, Austin, Texas. Jurisdiction was conferred upon the United States Court of Claims by Title 28 U.S.C. Section 1491.

Plaintiffs owned 99% of a general contracting business Carlos Blanco, Inc. Plaintiffs reported their income on a calendar year basis. On July 31, 1970, the corporation mistakenly distributed $65,200 in various tangible properties to plaintiffs as a partial redemption of their stock. The corporate business purpose was to improve the corporation's bonding capacity and liquidity (Angelos Deposition 25; corporate minutes on July 31, 1970).

During the same year, 1970, and *prior to audit by the Internal Revenue Service of 1970,* the plaintiffs on September 15, 1970, rescinded the transaction with their corporation: Plaintiffs issued their promissory note to the corporation for $65,200 and the shares of corporate stock were "re-issued" to him. Mr. Blanco's note was secured by his personal equity in the Alamo Appartments valued at $145,000. Interest was payable annually for five years with a balloon note thereafter (Corporate minutes dated September 15, 1970). Upon subsequent audit the Internal Revenue Service treated the $65,200 as a dividend.

In the following years the taxpayers paid the corporation the $65,200 plus interest thereon and deducted the payments as ordinary business expenses. These payments were disallowed upon audit as being capital contributions. Timely claims were made therefor.

REASONS WHY THE WRIT SHOULD BE GRANTED

I

May the parties to a transaction rescind same in the same taxable year, prior to audit by the Internal Revenue Service, so to avoid its effectiveness for Federal Income Tax purposes?

It is well settled that in Texas parties may by mutual agreement voluntarily rescind their contract (*Texas Co. v Ramsower* (Com) 7 SW2d 872 reh den) so long as the rights of third parties are not impaired (*Carter v Dean* (CA) 317 SW2d 607). The mutual release of contract rights by each party is sufficient consideration for the rescision (*McKinney v Rowson* (F.) & Co. (CA) 146 SW 643. An existing contract is conclusively presumed (*Hoffman Motors v G.F.C. Corp.* (CA) 304 SW2d 216, reh den err ref N R E) to be rescinded by the subsequent execution of another contract that contains different and inconsistent provisions concerning the same subject matter.

It is also well settled in Texas that the general rule requiring the parties be restored to their original position (*Brantley v Thomas* 22 Tex 270) has been construed to mean only that each be placed in *substantially* the same position as before the transaction (*Cator v Commonwealth Bonding & Gas Ins. Co.* (Com) 216 SW 140). The fact that the parties could not be placed in status quo by rescision is only one factor in judicial allowance of rescision (*Lanford v Parson* (CA) 237 SW2d 425, reh den, en ref N R E). Rescision is an equitable remedy

according full protection to all parties (*The Oriental v Barclay* (CA) 41 SW 117).

Thus in *Robert W. Adams* (1972) 58 TC 41, the parties by mutual agreement simply rescinded a prior mining contract. The Government argued that the rescision was to be ignored for it could not have been legally compelled. The Court agreed the rescision could not have been unilaterally disregarded but pointed out and gave effect to "the mutual termination of the contract". To carry out the rescision each party was obligated to transfer properties. The Government argued the transfers were "voluntary". The Court explicitly rejected this theory holding the transfers were not "voluntary" for they were made pursuant to the agreement to rescind. The Court held that a contract which may well be legally binding is nevertheless eligible for a mutual rescision with binding terms, the fullfillment of which is not "voluntary".

In this case, plaintiffs and the corporation mutually agreed to rescind the redemption. Each party thereafter fullfilled his obligation under the agreement. The Treasury Stock was returned; plaintiffs issued and paid their secured, interest bearing promissory note in the exact amount of the value of the original redemption.

Consequently, the Court of Claims decision directly conflicts with *Crellin's Estate v Commissioner,* 203 F.2d 812 (1953), aff'g 17T.C. 781 (1951), cert denied 346 U.S. 873 (1953). There the 9th Circuit ruled, as conceded by the Government that a previously declared and paid dividend can be

rescinded and not reportable as gross income when the rescission was legally binding under State law (here it is under Texas law). In accord are *Mitchell v Bookwalter Wheel Co.,* 4 OHIO N.P.N.S. 609, aff'g 75 U.S. 639 and *Hancock v Commissioner.* 18 T.C. 210 (1952).

II

May parties to a transaction substitute a valid new agreement in extinguishment of the old (Novation), and void the original agreement's effectiveness for Federal Income Tax purposes?

It is well settled in Texas that through mutual agreement parties can discharge a valid, existing contract by the substitution (Novation) of a new and valid contract *(Currie v Trammel* (CA) 289 SW 736 en ref). This may occur where one party obtains a discharge of an existing duty (here taxpayer was discharged of duty to surrender stock) and subjects himself to a new one (here taxpayer had duty to pay note). See Restatement, Law of Contracts Sections 424-430. Thus a Novation extinguishes one obligation through acceptance of an entirely new promise in satisfaction thereof (*Street v Smith Bros. Grain Co.* (CA) 255 SW 778). It is taxpayer's contention that the redemption followed by a loan constitutes a Novation, the loan extinguishing the obligation of redemption.

There are four essential elements to a Novation in Texas.

(A) The original obligation and the new agreement must both be valid and enforceable obligations. Here the resolution by the Board of Directors for both the redemption and the substitution of the loan created a valid and enforceable obligation. Sufficient consideration for the subsequent obligation would be the agreement to cancel an existing obligation (*Haile v Amarillo Nat. Bank* (CA) 283 SW2d 276), there being an agreement to

cancel the obligation to surrender stock and to redeem.

(B) There must be mutual consent and agreement between both parties (*Frost v First State Bank & Trust Co.* (Com) 276 SW 222). Here the parties executed the subsequent loan agreement solely to discharge the original obligation. There is no question that they consented and agreed to this Novation.

(C) The new agreement must be substituted for and in extinguishment of the original agreement (*Gauss-Langenberg Hat Co. v Alley* (CA) 154 SW 1062). It must operate as a release of the original agreement (*Slaughter v Hall* (CA 133 SW 496). Here the loan agreement displaced and extinguished the original redemption agreement. Both the taxpayer and the corporation were released from any obligations under the original agreement.

(D) There must be a valid new agreement (*General Finance & Guaranty Co. v Smith* (CA) 309 SW2d 531 ref den, err ref N R E). There is no factual issue on this point. The issuance to the corporation of an interest bearing note in exchange for the redeemed shares, evidenced by resolution of the Board of Directors in the Corporate Minutes, is clearly a valid new agreement.

In Sum, it is our contention that under Texas Law the subsequent issuance of an interest bearing note to the taxpayer and the corporation's return of the redeemed shares was a Novation, the substitution of a valid new agreement (loan) in extinguishment of the original agreement (redemption).

Consequently there was no dividend, only a non-taxable loan between the corporation and the taxpayer.

II (A)

The Court of Claims misapplied and misconstrued the reasoning of the Fifth Circuit in the *Meyer's* case.

In *Meyer's Estate v Comm'r,* 200 F.2d 592 (5th Cir. 1952) the taxpayer sought to "withdraw and rescind" (Page 1007-8) a prior election, which, if consummated, would have yielded ordinary income. Rescision was allowed where in the prior election the taxpayer had detrimentally relied upon a material mistake of fact, in this case a computational error as to the amount of earned surplus. In upholding the rescision the Fifth Circuit ruled that although an election cannot be revoked under the regulations, it is well settled there is no election without full knowledge of the facts. Good faith reliance on a material mistake of fact is sufficient to allow rescision. "To hold otherwise would have converted a remedial statute into a punitive one".

Subsequent cases continue to allow or disallow withdrawl and rescision of a prior election depending upon whether there was a mistake of law or fact. (See *Raymond v U.S.* 4 AFTR 5293, 269 F2d 181 (6th Cir 1959) and *Banker's & Farmers Life Ins. Co. v U.S.* 42 AFTR2d 78-6190 (8th Cir 1970) and 3 Merten's *LAW OF FEDERAL INCOME TAXATION Section 60.19).*

Now we are told by the Court of Claims that even if a taxpayer makes an election based upon good faith reliance on a material mistake of fact (as herein stipulated), withdrawal and rescision would be allowed only where there is "true rescision, in which both parties are restored to the situation as it existed before the transaction. . .". Not only has the "recision and withdrawal" requirement in the *Meyer's* case never been so construed, and not only will the result vary with the different definitions of rescision within each State, but also it is expressly contra the oft quoted intent of the *Meyer* rule: "not to convert a remedial statute into a punitive one" (*Meyer,* Page 597), "under circumstances which are extremely harsh, while withdrawal of the election will not impose" (*Banker's* at 79-5084) "burdensome uncertainties upon the administration of the tax loss" (*Meyer's* at 597).

In addition the Court erred in distinguishing *Meyer's* because there was a true rescision. Texas law does not require restoration to exactly the same original position (status quo ante), only "substantially" the same position as original occurence.

III

May parties to a series of transactions executed under a single theme collapse the transactions for Federal Income Tax purposes or can the Commissioner Internal Revenue alone do so?

(A) If so, is effective tax planning and correspondent reduction of taxes a valid business purpose in non-reorganization areas?

The Court of Claims erred in concluding that the subsequent loan transaction served no valid business purpose and consequently the taxpayer could not collapse the loan with the prior redemption so as to tax both transactions as a single transaction. The cases cited by the Court of Claims requiring a valid business purpose before collapse can be attained are reorganization cases. They involve transactions which had already been completed and formal entities established, such as utilizing a corporation and then later unsuccessfully attempting to ignore the existence of that same corporation. There is no such reorganization situation in the present case. Here taxpayer seeks only to have two steps treated as a single transfer, the subsequent step an attempt to reduce taxes.

The Court of Claims would hold that tax avoidance is not a valid business purpose but a sham. Consequently the subsequent transaction should be ignored and the taxpayer penalized on the original transfer. However, in the Fifth Circuit, it is well settled that tax avoidance and reduction of taxes may be

a valid business purpose (*Van Zandt v Commissioner* (5th Cir. 1965) 341 F.2d 440; *Mathews v Commissioner* (5th Cir. 1975) 520 F.2d 323; *Hobart Lerner* (United States Tax Court 1979) 71 T.C. No. 24). To hold otherwise would be to ignore the obvious. There can be no question that reduction of taxes is not only a valid business purpose but often the sole determinant of the form of the transaction undertaken. The Congress recognizes reduction of taxes as a valid business purpose and seeks to stimulate business through effective manipulation of the tax benefits, witness the 5% credit for new homes (Section 1034), the dividend exclusion (Section 116), political contributions (Section 218), depreciation (Section 167), and the list is endless. Tax reduction is clearly a valid business purpose. Oftertimes businesses frame a transaction solely upon tax consequences, witness the choice between a liquidation, a reorganization and a redemption.

In sum, the taxpayer as well as the Commissioner of Internal Revenue should be able to collapse a series of transactions for Federal Income Tax purposes. There is no requirement that there be a single business purpose before collapse can occur in non-reorganization areas. However, if there is a valid business purpose requirement in non-reorganization areas, effective tax planning and correspondent reduction of taxes satisfies that requirement.

CONCLUSION AND PRAYER

The questions presented herein have broad significance to both the taxpayer and the Internal Revenue Service in a broad range of cases.

The parties to a transaction should and have been able to rescind same in the same taxable year, prior to audit by the Internal Revenue Service.

Parties to a transaction should be able to extinguish the old agreement in favor of a new agreement valid for Federal Income Tax purposes. Consequently *Meyer* has been misconstrued.

Parties to a series of transactions executed under a single theme should and have been able to collapse the transactions for Federal Income Tax purposes. This opportunity is not limited to the Commissioner of Internal Revenue. Consequently tax planning and correspondent reduction of taxes is a valid business purpose in non-reorganization areas.

Because of the importance and broad application of these issues in Federal tax cases, the petitioners pray that this Court grant a Petition of Certiorari to the United States Court of Claims.

Respectfully submitted,

TOWNER LEEPER
Attorney for Petitioner
444 Executive Center Blvd.
Suite 112
El Paso, Texas 79902

PROOF OF SERVICE

The undersigned attorney of record for Petitioners, CARLOS and EMMA BLANCO, hereby certifies as follows:

(A) That I, Joe Chagra, am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Petition for Writ of Certiorari, as hereinafter shown:

(B) That the names and addresses of the attorneys of records for the adverse party are as follows:

The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

The Honorable M. CARR FERGUSON
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

THEODORE D. PEYSER
DONALD H. OLSON
Attorneys
Department of Justice
Washington, D. C. 20530

(C) That on this day I serve three printed copies of the foregoing Petition for Writ of Certiorari on the said Wade H. McCree, Jr. and the said M. Carr Ferguson, Theodore D. Peyser and

Donald H. Olson, attorneys for said Respondent, by depositing same in Emory Air Express, with prepaid express service, properly addressed to said attorneys for Respondent at their said addresses.

EXECUTED, this 19th day of October, 1979.

TOWNER LEEPER
Attorney for Petitioner
444 Executive Center Blvd.
Suite 112
El Paso, Texas 79902
(915) 533-6856

JOSEPH CHAGRA
Attorney for Petitioner
444 Executive Center Blvd.
Suite 112
El Paso, Texas 79902
(915) 533-6856

SWORN TO AND SUBSCRIBED BEFORE ME by the said JOSEPH CHAGRA and TOWNER LEEPER, Attorneys for Petitioner, this 12th day of October, 1979.

Jo Ellen Nye
Notary Public In and For
El Paso County, Texas

My Commission Expires:

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 531-77

(Decided July 18, 1979)

CARLOS AND EMMA BLANCO v. THE UNITED STATES

Towner Leeper, attorney of record,for plaintiff.
Donald H. Olson, with whom was *Assistant Attorney General M. Carr Ferguson,* for defendant. *Theodore D. Peyser,* of counsel.

Before Friedman, *Chief Judge,* Nichols and Smith, *Judges.*

ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

FRIEDMAN, *Chief Judge,* delivered the opinion of the court:

This case, now before the court on cross-motions for summary judgment, involves a voluntary attempt by the plaintiffs to undo a completed transaction within the same taxable year in order to avoid the originally unforeseen tax consequences of that transaction. For the reasons discussed below, we conclude that the plaintiffs' endeavors must fail.

I.

In 1970, the plaintiffs, Carlos and Emma Blanco, [1] owned 99 percent of the shares of Carlos Blanco, Inc., a construction and general contracting corporation. On July 31, 1970, Carlos Blanco surrendered to the corporation 2,281 shares of the corporation's common stock he owned, which the corporation subsequently held as treasury stock. In return, the corporation distributed to Carlos Blanco (1) shares of stock in a bank valued at $36,150, which had been purchased with corporate funds and which Blanco considered to be corporate assets, but which had been issued in Blanco's name, allegedly to allow for greater ease of transfer, and (2) corporate interests in other ventures. In addition, the corporation paid personal obligations of Carlos Blanco, cancelled an indebtedness of Blanco to the corporation, and purchased additional bank shares for him. The total value of the corporate property distributed to Carlos Blanco and the other benefits the corporation provided for him was $65,200.

Carlos Blanco and his accountant both stated in their depositions that the purpose of the July 31 transaction was to distribute corporate assets to Mr. Blanco. The accountant testified that there was no tax motive for the transaction. According to Carlos Blanco, he entered into the transaction

---

1. Emma Blanco is a party to this action only because she filed a joint income tax return with Mr. Blanco. References to "the taxpayer" are to Mr. Blanco.

because (1) there were several corporate assets already held in his name, (2) the assets served no corporate purpose except as investments, and (3) his accountant suggested that he "either change them over to the lawful owner, to the corporation, or buy them from the corporation." Mr. Blanco stated, "At that time I didn't have the money, so [the accountant] suggested that we sell some of our stock back to the corporation." The redemption had no significant effect upon the taxpayer's ownership interest in the corporation.

After this transaction was completed, the taxpayer's accountant learned that under established legal principles, the proceeds that Carlos Blanco had received and the other benefits the corporation had provided were taxable to him as a dividend pursuant to 26 U.S.C. § 301 *et seq.* The accountant recommended that Mr. Blanco issue to the corporation an interest-bearing note, in the principal amount of $65,200, and that the corporation return to him the previously redeemed shares in the corporation. Mr. Blanco and the corporation did so on September 15, 1970, prior to expiration of the taxable year in question. [2]

---

2. The note provided that interest at the annual rate of 5½ percent was payable quarterly, and that the principal was due on or before 5 years from the date of the note. The taxpayer made the requisite interest payments and several principal payments during the term of the note, and generally treated the note as a binding obligation to the corporation. Principal and interest on the note were paid in full on August 2, 1976. The taxpayer deducted payments on the note as ordinary business expenses.

The accountant testified in his deposition that the purpose of the second transaction was "to reverse the unfavorable tax affect [sic] of what was done on July 31, 1970." When asked whether there was any other reason for entering into the September 15 transaction, the accountant said that there was none. Before so stating, however, the accountant had suggested an additional reason for choosing the particular form of the September 15 transaction. The accountant stated that (1) the corporation was seeking bonding in order to enter the field of commercial construction, (2) the bonding company would not accept, as a corporate asset for bonding purposes, the corporation's interest in a joint venture valued at $17,318.98, (3) the joint venture interest, part of the assets distributed on July 31, would be among the assets returned to the corporation if the distribution were fully rescinded, and (4) the bonding company would accept as a corporate asset Carlos Blanco's personal note. The accountant indicated that the taxpayer issued a promissory note in the second transaction, rather than simply returning the previously distributed assets, in part because his note for the full amount would be more useful for binding purposes to the extent that it would cover the value of the joint venture interest. The accountant further testified:

> Q. . . . [W]as [bonding] part of your overall motivation in entering into the September 15 transaction or was this some element that came up after the September 15 transaction was decided on. Do you recall now, sir?
>
> A. Not right off hand. I am sure it was one part of, you know, that that had something to do with it.
>
> Q. Right. But the main element in the September 15, 1970 transaction was to reverse the unfavorable tax consequences that may have arisen from the July 31 transaction. Is that correct, sir?
>
> A. Yes, sir.

The accountant also stated that he considered the July 31 transaction a "proper" one, except that it would have resulted in unfavorable tax consequences.

In discussing the reason for the second transaction, Carlos Blanco, who relied upon his accountant's advise in tax matters, stated in his deposition: "I don't remember the reason that he gave us, but he said we did it wrong . . . . I would assume that it would be for tax reasons, because it was, as far as we were concerned, it was a legal transaction . . . . " Mr. Blanco later stated that the accountant "mentioned the fact that it might have some tax affect [sic] . . . . So we reversed the transaction then." The taxpayer agreed that what he hoped to accomplish by the second transaction was to "retain [his] ownership of the assets that had been transferred . . . but to do it in the form of a purchase transaction . . . ." The taxpayer stated that in considering whether to reverse the transaction by returning the assets or by issuing a promissory note, he was "thinking about having a clean financial statement for bonding purposes."

The Internal Revenue Service (1) determined that the July 31 distribution of corporate assets was taxable as a dividend, and (2) disallowed deductions taken by the taxpayer for payments on the promissory note, on the ground that they

were voluntary capital contributions. The taxpayer challenges these determinations on the grounds that the July 31 transaction was rescinded on September 15, 1970, and, alternatively, that the two transactions should be treated as a single, nontaxable sale of corporate assets in return for the taxpayer's note. For the reasons discussed below, we conclude that (1) the taxpayer in fact did not rescind the earlier transaction, (2) the two transactions were separate and distinct and should not be combinded, and (3) payments on the note were nondeductible, voluntary contributions to the capital of the corporation.

II.

The facts of this case do not support the taxpayer's claim that he rescinded the July 31 transaction. In a rescission, the parties are restored to their respective positions prior to the transaction. That was not done in this case.

Prior to July 31, 1970, the corporation owned the assets it distributed to Blanco, and Blanco was not indebted to the corporation for $65,200. After September 15, 1970, Blanco was indebted to the corporation for that amount, as reflected in his promissory note, and Blanco rather than the corporation owned the bank stock and other distributed assets the corporation previously had owned. Thus, the second transaction did not restore the parties to the *status quo ante*. Instead, it put them in a different position, more favorable to Blanco, by attempting to change the form of but not rescind the prior transaction. As Carlos Blanco admitted, in the second transaction he sought to "retain [his] ownership of the assets that had been transferred . . . but to do it in the form of a purchase

transaction . . . ."[3]

Since we hold that there was no rescission in this case, there is no occasion to consider whether or in what circumstances the parties to a completed transaction may rescind it in the same tax year, in order ro escape the tax consequences of the transaction that initially had not been anticipated. Nothing in this opinion is intended to indicate any views on that issue.

III.

Plaintiffs' alternative contention is that the two transactions should be combinded and treated as if there had been only a single transaction by which the corporation sold assets to and provided other benefits for Carlos Blanco, in return for Blanco's payment of $65,200. Asserting that under the tax laws substance must prevail over form, plaintiffs urge us to look at the net effect of the two transactions together rather than to consider them separately.

---

3. *Meyer's Estate v. Comm'r.* 200 F.2d 592 (5 Cir. 1952), upon which plaintiff relies, is distinguishable. There the court permitted the taxpayer to withdraw a previous election to be taxed in a particular manner because the election was based upon a computational error. That case did not involve a true rescission, in which both partirs are restored to the situation as it existed before a transaction; it involved unilateral action by the taxpayer to restore the legal situation that had existed before an election. Moreover, the taxpayer there completely undid a prior election, whereas here the taxpayer sought to retain the benefits of an earlier transaction and change only its form.

The courts have recognized that where a single business transaction is fragmented into two ostensibly separate steps which had no valid business purposes and which were taken to avoid taxes, the Commissioner may "collapse" two transactions into a single one and treat that entity as the taxable event. *See Gregory v. Helvering,* 293 U.S. 465, 469 (1935); *Weller v. Comm'r,* 270 F.2d 294, 296-97 (3rd Cir. 1959); 3 MERTENS, LAW OF FEDERAL INCOME TAXATION § 20.55. It is quite another matter, however, when a taxpayer who has completed a transaction seeks to "collapse" it with a second transaction to achieve the result he could have accomplished initially had he structured the transaction differently, especially where the two transactions had different purposes and the second transaction was effected primarily to avoid the unanticipated adverse tax consequence of the first transaction. In that situation the governing principle is that a taxpayer may not reopen and alter a transaction that was valid and complete for business purposes in order to obtain more favorable tax treatement, even though initially he could have cast the transaction in the altered mold. As the Supreme Court stated in *Comm'r v. Nat'l Alfalfa Dehydrating,* 417 U.S. 134, 149 (1974) (citations omitted):

> This Court has observed repeatedly that, while a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated or not, . . . and may not enjoy the benefit of some other route he might have chosen to follow but did not.

Neither the July 31 nor the September 15 transaction had as a purpose the sale of corporate assets to the taxpayer. The admitted purpose of the first transaction was to withdraw corporate assets from the corporation and to distribute them to the taxpayer without cost to him or to his wife. The plaintiffs concede that this kind of transaction is taxable as a dividend, and that the first transaction fully achieved its goal. The taxpayer further conceded in his depositions that he voluntarily entered into the second transaction to avoid the unfavorable tax consequences of the first transaction.

Although in the second transaction the taxpayer issued a note in order to recast the first transaction as a sale of assets, the second transaction was not designed to accomplish a sale of assets. The sale was merely the means of achieving the admitted end of avoiding taxation.

Neither transaction had as a business purpose the net effect of the two transactions combined, *i.e.,* a sale of assets. In fact, their net effect was inconsistent with the purpose of the first transaction, and incidental to the purpose of the second. The axiom that substance should prevail over form does not justify collapsing the two transactions in this case because neither in substance nor in form did they constitute a sale. In substance, the first transaction was a dividend, and the second was an attempt by the taxpayer to reopen a completed transaction for a preceived tax advantage. This case thus illuminates our statement that "in pratice form usually has some substantive consequences, so that if two transactions differ in form, they will probably not be identical as to substance." *W & W*

Fertilizer Corp. v. United States, 208 Ct. Cl. 443, 449, 527 F.2d 621, 624 (1975), *cert denied*, 425 U.S. 974 (1976).

IV.

Finally, the plaintiffs contend that "taxpayer mistakenly receive[d] money under a claim of right" and therefore is entitled to deductions for the repayments in subsequent years of any money "mistakenly" received. The claim of right, according to the plaintiffs, arose when the plaintiffs "legally obligated themselves to repay the money by issuing a fully secured, interest bearing, negotiable promissory note."

The palintiffs' claim of right argument misses the point. As already noted, the taxpayer voluntarily and unilaterally assumed the legal obligation represented by the note. He did not issue the note to satisfy any legal obligation to the corporation; he did so voluntarily and in order to reduce his own tax liability. The plaintiffs are not entitled to deduct such voluntary payments, made only in their perceived self-interest, either under a claim of right or under any other theory. *Cf. Crellin's Estate v. Comm'r.* 203 F.2d 812 (9th Cir. 1953).

CONCLUSION

The plaintiffs' motion for summary judgment is denied, the defendant's motion for summary judgment is granted, and the petition is dismissed.

Supreme Court, U.S.
FILED
JAN 9 1980
MICHAEL RODAK, JR., CLERK

No. 79-749

In the Supreme Court of the United States

OCTOBER TERM, 1979

CARLOS AND EMMA BLANCO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-749

CARLOS AND EMMA BLANCO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner[1] seeks review of the decision below in this federal income tax case upholding the Commissioner of Internal Revenue's determination that a $65,200 distribution from his controlled corporation was a dividend taxable at ordinary income rates.

The pertinent facts are as follows: On July 31, 1970, petitioner surrendered to Carlos Blanco, Inc., a corporation 99% of the stock of which was owned by him and his wife, 2,281 shares of that company's common stock

---

[1] "Petitioner" refers to Carlos Blanco. Emma Blanco is a party solely because of having filed a joint income tax return for the year at issue.

in return for property[2] and in satisfaction of various debts owed by petitioner.[3] The total value of the property distributed and other benefits provided by the corporation to petitioner was $65,200 (Pet. App. A-1 to A-2).

Petitioner and his accountant testified that the purpose of this transaction was to distribute corporate assets to petitioner because some of the assets were already in petitioner's name and some corporate assets served no corporate purpose except as investments. Petitioners transferred some of his stock back to the corporation because he lacked the necessary cash to make the purchase. After completion of the transaction, petitioner's accountant learned that the distribution of property and other consideration from the corporation to petitioner were taxable to him as a dividend because the stock redemption had no significant effect upon Blanco's proportionate stock interest in the corporation. At the accountant's recommendation, petitioner gave the corporation a $65,200 note, bearing 5 1/2% interest, and the corporation returned the previously redeemed corporate shares to petitioner (Pet. App. A-2 to A-3).

---

[2]Petitioner received Citizens Bank stock worth $36,150, which had been purchased with company funds but held in his name; and the corporation's interest in Los Amadores, valued at $3,000; the corporation's stock interest in Pan American Savings & Loan, valued at $1,900, and the corporations interest in a joint venture, valued at $17,318 (Dep. 8-9, 11, 13, 21).

[3]The corporation satisfied the following obligations owed to it by petitioner: $1,148.19 owed on the Cleaning Center joint venture; interest of $562.14 and $292.05 owed to the First National Bank of Portales and the Southwest Bank of Amarillo, respectively; payments of $3,783.64 and $12.50 on a loan from Fernandez to petitioner; $40.40, representing Fed-Mart dividends payable to the corporation but cashed by petitioner, and $998.03, representing the balance due on amounts borrowed from the corporation by petitioner (Dep. 10, 11, 19-22).

The Court of Claims held that the second transaction was "an attempt by the taxpayer to reopen a completed transaction for a perceived tax advantage" (Pet. App. A-9) and did not alter the dividend treatment of the first transaction. Although petitioner's accountant testified that the purpose of this second transaction was to reverse the earlier transaction,[4] the Court of Claims correctly noted (Pet. App. A-6) that "the second transaction did not restore the parties to the *status quo ante*." In fact, Blanco was placed in a more favorable position after the second transaction because he obtained individual ownership of the assets which the corporation had previously owned. The court further ruled that petitioner was not entitled to deduct payments made to the corporation, where he voluntarily assumed the legal obligation represented by the $65,000 promissory note, in order to reduce his own tax liability (Pet. App. A-7 to A-8).[5]

The Court of Claims correctly held that petitioner's transfer of a note of his corporation did not mitigate the dividend consequences of the initial stock redemption. There is no question that the first transaction fully reflected the intentions of the parties: the transfer of corporate assets to petitioner and the use of corporate funds to satisfy petitioner's individual obligations (Pet.

---

[4]The accountant stated that a return of assets was not considered because a bonding company would not accept the corporation's interest in the joint venture as a corporate asset for bonding purposes, but would accept petitioner's individual promissory note (Pet. App. A-3).

[5]Petitioner does not challenge this aspect of the decision below that his subsequent voluntary determination to pay an amount equal to the redemptive distribution to the corporation would not support a deduction because such payments would be capital contributions. Cf. *Crellin's Estate* v. *Commissioner*, 203 F. 2d 812 (9th Cir.), cert. denied, 346 U.S. 873 (1953); *United States* v. *Simon*, 281 F. 2d 520 (6th Cir. 1960); *Pahl* v. *Commissioner*, 67 T.C. 286, 290 (1976).

App. A-2 to A-3; Dep. 25.) In these circumstances, where the redemption of petitioner's stock had "no significant effect upon [his] ownership interest in the corporation" (Pet. App. A-3), it was essentially equivalent to a dividend within the meaning of Sections 301, 302 and 316 of the Internal Revenue Code of 1954 (26 U.S.C.). See *United States* v. *Davis*, 397 U.S. 301 (1970).

The Court of Claims properly rejected petitioner's subsequent attempt to "reopen and alter a transaction that was valid and complete for business purposes in order to obtain more favorable tax treatment" (Pet. App. A-8) by substituting his promissory note for the stock interest which actually served as the consideration. As this Court observed in *Commissioner* v. *Nat. Alfalfa Dehydrating*, 417 U.S. 134, 149 (1974):

> [W]hile a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated or not, *Higgins* v. *Smith*, 308 U.S. 473, 477 (1940); *Old Mission Portland Cement Co.* v. *Helvering*, 293 U.S. 289, 293 (1934); *Gregory* v. *Helvering*, 293 U.S. 465, 469 (1935), and may not enjoy the benefit of some other route he might have chosen to follow but did not. "To make the taxability of the transaction depend upon the determination whether there existed an alternative form which the statute did not tax would create burden and uncertainty." *Founders General Corp.* v. *Hoey*, 300 U.S. 268, 275 (1937); *Television Industries, Inc.* v. *Commissioner*, 284 F. 2d 322, 325 (CA2 1960); *Interlochen Co.* v. *Commissioner*, 232 F. 2d 873, 877 (CA4 1956). See *Gray* v. *Powell*, 314 U.S. 402, 414 (1941).

Indeed, this Court has never permitted a taxpayer to recharacterize a transaction merely because unfortunate tax consequences were discovered after the event.[6] Cf. *United States* v. *Lewis*, 340 U.S. 590, 591 (1951).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1980

---

[6]As the Court of Claims noted (Pet. App. A-7 n.3) *Meyer's Estate* v. *Commissioner*, 200 F. 2d 592 (5th Cir. 1962), upon which petitioner relies (Pet. 10), is distinguishable. That case involved a taxpayer who was permitted to withdraw unilaterally an election because it had been based upon a misapprehension as to the extent of surplus possessed by a corporation. The taxpayer was aware of the law, but made a decision "upon a computational error" (Pet. App. A-7). Here, on the other hand, petitioner failed to undo his first agreement with the corporation. Moreover, he does not suggest the first transaction which he thereafter attempted to modify was executed upon a misapprehension of fact.